In the Supreme Court of the United States

October Term, 1939

Henry M. Boker,
Petitioner,
v.
Horace S. Chapman,
Respondent.

No. 207.

BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1900.

HENRY M. BAKER,
Petitioner,
vs.
HORACE S. CUMMINGS,
Respondent.

No. 207.

STATEMENT OF FACTS.

In the year 1874, Horace S. Cummings and the petitioner, Henry M. Baker, formed a partnership under the firm name of Cummings & Baker, for the conduct of business as attorneys in the prosecution of claims against the Government. The agreement of partnership was verbal and was dissolvable at the pleasure of either party. The partners were to share equally in the profits and losses of the business. They remained in partnership until September, 1889, when the firm was dissolved. In July, 1889, shortly before the dissolution of the partnership, an account was stated between the petitioner and the respondent, which showed a balance due from Cummings to Baker, amounting to $2,712.81. In December, 1889, after the dissolution of the partnership, Baker brought this suit at law against Cummings to recover said sum of $2,712.81 due him upon the account stated between them. On February 1, 1890, *before* plea was due in the law suit mentioned, Cummings, the defendant in the law suit, filed a bill in equity in the

Supreme Court of the District of Columbia against Baker, the same being found on page 27 of the Record.

The bill alleged that about the 1st of January, 1876, Cummings and Baker entered into a partnership by parol to prosecute claims against the Government of the United States, and that it continued until September, 1889, when it was dissolved, and that among the items of business of the firm were cases known as "inspector cases," of which the firm had a great many. The bill further alleged that on September 6, 1886, Cummings assigned to Baker in writing all his interest in the fees of such so-called "inspector cases," including those in which the fees had not been divided, excepting two cases only, whether paid or unpaid, filed or outstanding. The bill further alleged that this assignment was procured by fraudulent representations made by Baker. It further alleged that this present law suit had been instituted in the Supreme Court of the District of Columbia; that all of the items mentioned in the bill of particulars annexed to the declaration therein, originated in and grew out of the partnership dealings of the parties, and that they did not constitute a full adjustment of the receipts of said Cummings and of said Baker, and that only by a full, proper and complete accounting and discovery under the order and direction of a court of equity could a proper adjustment be had of the rights and equities of the complainant and defendant growing out of their partnership dealings. The bill further alleged that this suit at law was not yet at issue, but that the time for pleading had nearly approached and that the complainant Cummings, could not, under the rules of pleading at law, incorporate in his plea the equitable defenses set forth in the bill and which in a court of equity would prevail against Baker's demand, and especially that the plaintiff's equitable right to have discovery and to have the assignment referred to canceled, was not cognizable by a court of law; and that if the plaintiff in the law suit, Baker, was permitted to prosecute said suit

against Cummings, he, Cummings, would be deprived of his defenses, and that therefore he was entitled to have Baker enjoined from the prosecution of said suit at law. The bill therefore prayed for discovery, that the assignment referred to might be declared null and void, and that Baker should be enjoined from the further prosecution of this suit at law, and that a complete accounting might be had in the equity court between Baker and Cummings in respect of the partnership dealings, and Baker be decreed to pay Cummings the amount found to be due him.

Because of the filing of said equity suit all proceedings in the present law suit were suspended. In the progress of the litigation in the equity suit, the court below held that Baker was indebted to Cummings in a sum between thirty and forty thousand dollars, after allowing Baker a credit for the sum of $2,712.81, the identical sum claimed in this law suit. From the decree of the Supreme Court of the District of Columbia an appeal was prosecuted to the Court of Appeals of the District of Columbia, which affirmed the decree of the court below. 8 App. D. C. 515. From this decree of that court affirming the decree of the Supreme Court of the District of Columbia, an appeal was prosecuted to this court, and this court on February 21, 1898 (169 U. S. 209), reversed the decree of the Court of Appeals and remanded the case, with instructions to set aside the decree of the Supreme Court of the District of Columbia and to remand the same to that court with instructions to dismiss the bill. Thereafter, the Court of Appeals did remand the case to the Supreme Court of the District of Columbia with the instructions stated, and that court thereafter, on the 18th day of April, 1898, passed its final decree, in general term and without qualification, pursuant to the mandate of this court, dismissing the bill of Cummings.

On the 10th day of February, 1892, *pending* the disposition of the *equity case referred to, and more than two years after its institution*, Cummings filed pleas to this law suit

(page 4 of the Record), the only ones thereof which it is necessary to consider being the 4th and 5th, in which the defendant Cummings sought to offset the amount of the plaintiff's claim by an alleged indebtedness of $35,873.35. Nothing further was done in the law case until June 16, 1898, after the dismissal of the equity case referred to by the Supreme Court of the District of Columbia pursuant to the mandate of this court, when Baker filed the replications found on page 15 of the Record. To the pleas of set-off, with leave of court, Baker pleaded, first, limitations, secondly, that in consideration of $15,000 Cummings had on the 6th day of September, 1886, assigned to him all his interest in the "inspector cases" and that the amount claimed in the set-off filed by Cummings was part of the fees received by Baker in the prosecution of the "inspector cases" covered by the assignment of Cummings; and fourth, that after the execution of the assignment, Cummings instituted the equity suit referred to in which by decree passed therein, he recovered from Baker the sum of $32,772.14 for the identical items claimed in the defendant's plea of set-off, and that said decree was thereafter reversed and the complainant's bill dismissed generally, pursuant to the mandate of this court, and that therefore the claim of the defendant to set off such items was *res adjudicata*. To these pleas Cummings replied, first, denying that there was any consideration for the assignment, and second, that the assignment was obtained by fraudulent concealment and misrepresentation. The defendant rejoined that the matters therein referred to were *adjudicata* by reason of the decree of the court in the equity case referred to. To these pleas of *res adjudicata* Cummings responded (p. 20 of the Record), that this court in its *opinion* expressly refused to decide whether the assignment was without consideration and void, and whether the assignment was obtained by fraudulent concealment and misrepresentation. To these pleas Baker demurred. The demurrer was sustained, Justice Cole rendering the opinion found in the appendix to

this brief. Thereafter issue was joined in due course. After issue was joined, the stipulation (p. 23 of the Record) was entered into between the parties to the suit, wherein it is agreed that the sum claimed in the law suit, now before this court, is the identical sum referred to on pages 227 and 248 of the Record on appeal to the Supreme Court of the United States in the equity case referred to. By reference to the Record on appeal to this court it will be noticed that on page 227 in the hearing before the auditor in the equity case, Mr. Mackay, on behalf of Mr. Cummings, admitted that Mr. Baker was entitled to recover from Cummings the sum claimed in the law suit, and on page 248 of said Record, Cummings himself, when testifying before the auditor, stated as follows:

> "Mr. Baker and I agreed in regard to those cases—in regard to the fees due to him and the fees due to me and in the final agreement, in regard to those fees—there was an amount due to him, of some $2,700 and that he claims credit for in his account, *which I admit.*"

The stipulation further recites that *after* the institution of this *law suit* Cummings instituted the *equity* proceedings referred to against Baker and that the several items of account set forth in the pleas of set-off filed in this law suit are respectively the *identical items set up, referred to and claimed in said equity cause.*

The stipulation further provided that if the court on inspection of the Record and proceedings in said equity cause and of the Record and proceedings in this cause, should be of opinion that Cummings may not set up in bar of Baker's action any of the items of set-off and counterclaim as claimed in this action, but is concluded by the proceedings and decree in the equity cause, then that the court might enter judgment for Baker against Cummings for the sum of $2,712.81, with interest from July 31, 1889, as claimed in the declaration, but if the court should be of opinion that

any of said items of set-off and counterclaim might be set up in bar of the plaintiff's action herein, then that this case should be remanded to the docket for trial by jury.

Upon this stipulation the cause came on for hearing before Mr. Chief Justice Bingham on March 27, 1899, who, being of the opinion that Cummings was concluded as to all of the items embraced in his plea of set-off by the decree in the equity cause, rendered judgment in favor of Baker against Cummings in accordance with the terms of the stipulation.

From that judgment Cummings prosecuted an appeal to the Court of Appeals of the District of Columbia and as required by the terms of the stipulation, made part of the Record, the Record on appeal in the equity case referred to.

That court, on October 19, 1899, reversed the judgment of the Supreme Court of the District of Columbia. The opinion was delivered by Mr. Justice Shepard (Rec., p. 319) and concurred in by Mr. Justice Morris. Mr. Chief Justice Alvey dissented, but delivered no dissenting opinion (Rec., p. 330). The result is, that two of the justices of the Supreme Court of the District of Columbia, Mr. Justice Cole (Appendix to this brief), and Mr. Chief Justice Bingham (Appendix hereto), and Mr. Chief Justice Alvey, of the Court of Appeals, three justices, concur in the opinion that judgment should pass for the petitioner Baker, while two justices, Mr. Justice Shepard and Mr. Justice Morris, who constitute a majority of the Court of Appeals, are of opinion that the defendant Cummings is not concluded by the decree of this court, but may litigate anew the same matters decided by this court February 21, 1898. (169 U. S. 189).

Thereafter, on February 10, 1900, a petition was filed in this court praying for a writ of certiorari, which petition was granted, and in that way the case now comes before this court.

The majority of the Court of Appeals in their opinion held that although the present suit is between the same parties and over the same subject-matter, as the equity suit, the decree in the equity suit is *adjudicata* only as to that (in the language of the court, page 326)—

> "which ought to have been decided—that is to say, what must have been decided as expressly at issue and that also which must either have been assumed, admitted expressly or by implication or proved, in order to warrant the judgment or decree rendered."

The court also said (p. 324):

> "The application of this general principle (*adjudicata*) to the peculiar features of the case shown by this record presents a question of grave difficulty, involving, as it does, also the delicate task of *defining the scope* of a *general decree* entered in *pursuance* of a *mandate* of the *Supreme Court of the United States.*"

The majority of the court then examined the opinion of this court, and coming to the conclusion that the decree of this court, though absolutely unqualified, was not upon the merits, and, therefore, not a bar to the claim of Cummings to recover in this suit the identical items set up and claimed in the equity suit, reversed the judgment below.

In the conclusion of the opinion the majority of the Court of Appeals say (Rec., p. 330):

> "If we have erred we have the satisfaction of knowing that the amount in controversy gives the appellee the right to a review of our decision."

ASSIGNMENT OF ERRORS.

The court below erred in finding and holding—

1. That the unqualified decree of this court directing the dismissal of the bill in equity, and its actual dismissal

pursuant thereto, is not a bar to the set-off interposed in the present suit.

2. That the decree of this court in the equity case was based upon the laches of Cummings, and that such a decree, though unqualified, is not a decision on the merits and a bar to the set-off of the defendant.

3. That the cancelation of the assignment from Cummings to Baker alone conferred jurisdiction in the equity suit, and that, therefore the decree in that case does not operate to bar Cummings from undertaking to set aside the assignment on the grounds of fraud and lack of consideration in the present suit.

4. In resorting to the opinion of this court for the purpose of qualifying the unqualified decree of this court in the equity case.

5. In not affirming the judgment of the Supreme Court of the District of Columbia in favor of the petitioner.

BRIEF.

The scope of the issues in this case has been very much narrowed by the stipulation (p. 23 of the Record). By that stipulation it is agreed that if—

> "the defendant (Cummings) herein may not set up in bar of the plaintiff's action any of said items of set-off and counterclaim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff (Baker) . . . but if the court shall be of opinion that any of said items of set-off or counterclaim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury."

From this stipulation, therefore, it is apparent that if the several items of set-off and counterclaim as pleaded in this

action are *adjudicata* by reason of the decree of this court in the equity case (169 U. S. 189), the judgment of the court below should be reversed and the judgment of the Supreme Court of the District of Columbia affirmed.

It is important, therefore, to determine whether the Record, proceedings and decree in the said equity cause embrace all of the elements necessary to render *adjudicata* the items of set-off filed in this action.

In Lyon *vs.* The Perrin & Gaff Mfg. Co., 125 U. S. 698, the court said:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of four conditions, viz.: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made."

This court in Durant *vs.* The Essex Co., 7 Wall. 107, added to the elements essential to sustain a plea of *res adjudicata* enumerated in Lyon *vs.* The Perrin & Gaff Mfg. Co., *supra*, the requirement that the decree must be upon the merits. The court stated:

> "*The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination.*"

Whether the plea of *res adjudicata* in this case concludes the defendant as to his plea of set-off will therefore be determined by ascertaining if the elements essential to the maintenance of such plea, as determined by this court in the foregoing decisions, are found to be present.

The identity of the cause of action and of the thing sued for and the identity of the parties to the action, are all admitted by the stipulation, found on page 23 of the Record. By reference to that stipulation, it will be seen—

> "that the several items of account set forth in the pleas of set-off herein, are respectively the *identical* sums set up, referred to and claimed in said equity cause."

The stipulation also admits the identity of the parties and that in both proceedings Cummings sought to recover from Baker the amount of said several items. The fourth essential pointed out in Lyon *vs.* Perrin, "identity of the quality in the persons for or against whom the claim is made," sufficiently appears from the stipulation also.

If, therefore, the decree of this court was not made "because of some defect in the pleadings, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits," it is a final determination. Durant *vs.* Essex Co., *supra.*

It is perfectly clear that the decree in the equity case was not made "because of some defect in the pleadings." Nor was it made "for want of jurisdiction or because the complainant had an adequate remedy at law." It will be remembered that Cummings himself appealed to the court of equity and asserted its jurisdiction, as a basis for relief, in the following manner (Rec., p. 31):

> "And complainant avers that all of the items in the said bill of particulars originate in and grow out of the partnership dealings of the parties, and not otherwise, and that the said items do not constitute a full adjustment of the rights of this complainant and the said defendant, and that only by a full, proper, and complete accounting and discovery under the order and direction of a court of equity could a proper adjustment be had of the rights and equities of the complainant and defendant growing out of their partnership dealings. That the said suit at

law is not yet at issue, but that the time for pleading thereto has nearly approached, and that the complainant can not under the rules of pleading at law incorporate in his plea the equitable defenses herein set forth, and which in a court of equity would prevail against the defendant's demand, and especially is the equitable right of the complainant to have discovery in the premises and to have the said assignment canceled and held for naught, a matter not cognizable by a court of law, and if the defendant were, therefore, permitted to prosecute his said suit at law against complainant this complainant would be deprived of his defenses to said suit now pending as aforesaid, and that the complainant is therefore entitled to have the defendant enjoined from prosecuting his said suit at law and to have this court order and direct a full and complete accounting between complainant and defendant in respect of their partnership dealings as aforesaid."

In Case *vs.* Beauregard, 11 Otto, 688, as in this case, after availing himself of his equitable remedy on the distinct ground that he had no remedy at law, the defendant sought to avail himself of the same defense thereafter at law, and in considering this position, the court said:

"The bill in that case asserted, in the most ample terms, the remedilessness of the complainant at law. It averred that at and before the transfer and conveyances of the partnership property, sought to be charged, to the railroad company, each of the members of the partnership was largely indebted, without means, and in a state of insolvency, and that they had since been and still were insolvent; so that a suit at law and the recovery of a judgment against them, or either of them, would not afford the complainant any relief, because neither of the partners have or had, since the dates of the pretended transfers of said partnership property, any property whatever upon which the complainant could levy an execution at law, or seize for the satisfaction of the debt due to the bank. What more could have been

> necessary to show that the complainant had no remedy at law; that his remedy, if he had any, was in equity."

In view of these allegations, the court did take jurisdiction and the parties proceeded to their proofs. The jurisdiction of the equity court was not and can not now be questioned.

The majority of the Court of Appeals, in their opinion, say (page 324 Record):

> "Therein (in the bill in equity), as shown in the statement of the case, he alleged the procurement of the said assignment through fraudulent misrepresentations and concealment, and prayed its cancelation. This, being a relief that could not be had at law, presented the necessary foundation of the jurisdiction of the court of equity."

And again (page 326 Record):

> "Now, as we have seen, the gravamen of the bill of Cummings was the cancelation of the assignment held by Baker. This *alone conferred the jurisdiction* in equity."

In these statements, we respectfully submit, the court below erred. While it may be true that a court of equity only could order the *cancelation* of the assignment, the grounds alleged for its cancelation were as available in defense of the present law suit, and in support of the set-off, as in the equity suit; and, indeed, that is what Cummings now seeks to do, and which, by its judgment, the Court of Appeals says he may do. The court below is also in error in stating the request for the cancelation of the assignment "*alone* conferred the jurisdiction in equity." For, as shown, the bill expressly alleged (page 31 Record)—

> "And the complainant avers that all of the items in the said bill of particulars originate in and grow out of the partnership dealings of the parties, and

not otherwise, and that the said items do not constitute a full adjustment of the rights of this complainant and the said defendant, and that only by a full, proper and complete accounting and discovery under the *order and direction of a court of equity* could a proper adjustment be had of the *rights and equities* of the complainant and defendant *growing out of their partnership dealings.*"

And the bill in equity prayed an accounting. It is therefore obvious that the court of equity had jurisdiction also because the suit sought a settlement of partnership affairs, and an accounting, the last being a matter of which both the law and equity courts had cognizance. But after all, under the authorities, what matters it what was the ground of jurisdiction, so long as it appears the court did have jurisdiction? Because if the court did have jurisdiction, and the case was not dismissed on "some other ground which does not go to the merits," the decree in the equity case is necessarily a bar, the present suit being between the same parties and about the same subject-matter.

The Decree of the Supreme Court of the United States was Upon the Merits.

Was then the decree of this court "upon some other ground which does not go to the merits?"

The primary contention of the attorney for Cummings is, that in order to determine if the decree of this court was upon the merits, we may look to its opinion. We respectfully submit, on the other hand, that recourse may be had to the opinion of the court *only* when the record and decree leave the matter in doubt. The decree itself is the sentence of the law, and it can not be restricted or qualified by the opinion filed in the case. The record and decree in this case leave no doubt whatever upon the subject. The very object of the defendant in seeking to refer to the opinion is to *raise a doubt*, because it is obvious the doubt

which he claims to exist is found, if found at all, in the opinion itself and *not* in the record or decree.

The authorities seem to remove all question upon the subject.

In Campbell et al. *vs.* Rankin, 9 Otto, 261, considering a similar proposition as that here maintained, this court said:

> "The issue in both cases was, to which claim the disputed piece of mineral deposit belonged and *if that issue was not clear*, it was competent under the decisions we have cited, to show by parol proof that the controversy was over the same locality and that the issue had therefore been decided against Rankin."

The matter seems to have been specifically and definitely decided in Davis *vs.* Brown, 94 U. S. 423, where this court said:

> "When a judgment is offered in evidence in a subsequent action between the same parties upon a *different demand*, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, *when not disclosed by the pleadings*, must be shown by extrinsic evidence."

Again, in Russell *vs.* Place, 94 U. S. 606, this court said:

> "If there be an *uncertainty* on this head of the record . . . the whole subject matter of the action will be at large and open to a new contention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, *when the record leaves the matter in doubt*, such evidence is admissible."

The opinion is no part of the record.

England *vs.* Gebhart, 112 U. S. 502, 506.
Sargeant *vs.* State Bank, 12 How. 371.
Fisher *vs.* Cockerell, 5 Pet. 248, 254.

We therefore submit that recourse can not be had to the opinion of the court in this case inasmuch as the matter at issue in the equity case "is not left in doubt."

The Opinion of the Supreme Court.

Although the right to do so is denied, yet, for the sake of argument, assuming the right exists, an examination of the opinions of this court, of the Court of Appeals of the District of Columbia and of the Supreme Court of the District of Columbia plainly reveals that the merits of the controversy were in issue, were considered and decided in the equity suit.

Cummings filed his bill in equity for an accounting claiming that he had no adequate remedy at law, took a mass of testimony, had several references to the auditor and *actually obtained a decree against Baker for the identical items of set-off which he now seeks to recover in this action.* To permit him to again litigate the same matter in this court after a decree in the equity court would, it seems to us, be a travesty upon justice.

It is an undisputed maxim of the law that *nemo debet bis vexari pro una et eadem causa.* This doctrine seems to be particularly applicable to this suit as the said equity cause "vexed" the parties to it for more than eight years. The equity cause was based upon allegations by Cummings that Baker had defrauded him in various ways in the purchase of his rights in sundry cases and the fees resulting therefrom, said cases being technically known as "inspector cases," and secondly, that in paying him for them Baker had used funds to which Cummings was entitled and hence that the sale was void for want of consideration. To show that Cummings relied on the first of these contentions, reference can be made to the Record, pages 7, 29, 30, 31, 48, 58, 68, 80, 81, 83, 84, 116, 121, 243 and others, and to show that he relied on the second claim, namely, that Cummings was paid from his own money, pages 30, 47, 84, 237, 238, 246, 247 and others.

If a second suit or action is brought for the same cause as the first one, as this is, it naturally follows that it will be sustained by the same evidence. The present defendant has pleaded nothing he did not put in evidence in the suit which was determined by the United States Supreme Court and suggests no evidence that was not fully considered by this and by the other courts which passed upon the equity suit. That being so, his present contention must be to get a reconsideration of matters already pleaded and decided, and hence *adjudicata*. The consideration of the Record made part of this case by the stipulation reveals this beyond doubt. Reference to the defendant's brief filed in the equity case will show that he relied solely upon the points of fraud and no consideration to secure a decree in his favor as to the very self-same items covered by the offset pleaded herein, and reference to the opinion of Mr. Justice Hagner (Record, pages 234 to 245) and to the opinion of Mr. Chief Justice Alvey, of the Court of Appeals (pages 246 and 247 of Record), shows that these two "points" were especially considered by them and that the decree entered in the Supreme Court of the District of Columbia and in the Court of Appeals of the District of Columbia was strictly based upon the allegations and proofs of fraud and failure of consideration and upon the finding that Cummings "was paid from his own money."

And this court specifically and distinctly considered both of these points and after stating the findings in the courts below (169 U. S. 207), decided both of them adversely to Cummings. It said: "But neither of these views meet with our approbation," and then considers both of them at length and adds—

> "to say then that Cummings was paid by his own money necessitates deciding that the fraud was established as alleged by Cummings"—

and closes by saying—

> "because we rest our conclusion upon the application of the bar of the statutes and the *laches* of Cum-

> mings, *we must not* be considered *as intimating* that we conclude that there was either clear and convincing proof or even a preponderance of proof that the sale was as claimed by Cummings."

This expressive language of this court becomes more emphatic when we remember that the court early in its decision, said:

> "In entering upon an analysis of the evidence upon this particular subject, we shall be governed by the principle determined by this court in numerous cases, of which Stuart *vs.* Hayden, 169 U. S. decided at the present term, is the last expression, that when two courts reach the same conclusion on a question of fact, their finding will not be disturbed, unless it be clear that their conclusion was erroneous."

The two courts below had both found "fraud," and that Baker had paid Cummings "from his own money" for his interest in the inspector cases bought of him. These findings this court declared to be clearly erroneous as that part of the opinion just quoted and the discussion of the facts of the case, which follows, unmistakably demonstrates.

As said by Mr. Chief Justice Bingham of the Supreme Court of the District of Columbia in deciding this case (Appendix to this Brief)—

> "It is shown by the record that the matters that are now involved in the plea of set-off were involved in that (equity) case, that they were discussed and commented upon by the (this) court in its opinion and necessarily decided by the court. . . . In this case it seems to me not only might the matters of account between the parties have been litigated but that they were litigated and that all the matters of set-off on the part of the defendant in this case were expressly in issue and expressly litigated in the equity case."

To hold that the decree of this court did not finally settle all the matters upon which the suit of Cummings *vs.* Baker was instituted and prosecuted, would seem to be very remarkable. That Cummings is estopped by that decree from having considered in the pending suit either the claim of "fraud" or of "no consideration" as to items of account determined by that equity suit, seems quite clear, inasmuch as those contentions have certainly been decided by a court of competent jurisdiction, upon the merits, in a cause instituted by Cummings, expressly alleging that the court had jurisdiction, and possessing the four elements of identity essential to constitute *res adjudicata.*

Surely the eight years' litigation was not a farce, but it would seem very much like a farce if Cummings can now, in this suit, recover the same items and repudiate his assignment on identically the same ground as alleged in the equity suit, because, as he claims, this court has merely refused to require the cancelation and surrender of the assignment, because his application for that purpose was delayed too long.

As we have shown, this court, as a matter of fact, fully considered and discussed at length the evidence in the case relating to "fraud" and "no consideration," but in its opinion stated that it preferred to rest its decision upon the bar of limitations. Giving then the very narrowest and most unreasonable construction and effect to the decree and opinion of this court, at the very least, it certainly decided that Cummings was barred by limitations from maintaining his suit to set aside the assignment on any ground whatever. Is a decision upon such a ground a decision on the merits?

The majority of the Court of Appeals say (page 327, Record):

> "Refusal, then, to entertain a bill because of the *laches* of the complainant is not an adjudication upon the merits of the suit, and dismissal for that reason, ought not to bar an action at law involving the *same cause of action* any more than where it is

> for want of jurisdiction on other grounds or for defect in the pleadings."

In this we respectfully submit the court below erred.

In the work of the present attorney for the respondent, Mackey's Practice and Procedure relating to the District of Columbia, page 29, the nature of such a plea is stated as follows:

> "The plea of the Statute of Limitations is now regarded with the same effect as other legal defenses."

The defense of limitations is now regarded as a meritorious one.

Knodeler *vs.* Meloy, 2 MacA. 239.
Clemenson *vs.* Williams, 8 Cranch, 172.
Bell *vs.* Morrison, 1 Pet. 351.
M'Cluny *vs.* Silliman, 3 Pet. 270.
United States *vs.* Wilder, 13 Wall. 254.

Statutes of Limitations are now favorably considered. They are "statutes of repose."

Leffingwell *vs.* Warren, 2 Black, 599.
Thompson *vs.* Shepherd, 122 U. S. 231.

In Knodeler *vs.* Meloy, *supra*, in considering the nature of the plea of limitations, the Supreme Court of the District of Columbia held:

> "The plea is now regarded with the same favor as other defenses. The ancient prejudices have passed away and the prevalence of judicial opinion is now in favor of a just and reasonable construction of the statute. The Supreme Court of the United States have sanctioned this doctrine perhaps more clearly than any other tribunal. In Clemenson *vs.* Williams, 8 Cranch, 72, Chief Justice Marshall declares that 'the Statute of Limitations is entitled to the same respect with other statutes and ought not to be explained away.' In Bell *vs.* Morrison, 1 Pet. 351, the

> language of the court is still more expressive, Mr. Justice Story saying that: 'It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of the witnesses.'
>
> "To the same effect are M'Cluny *vs.* Silliman, 3 Pet. 270 and U. S. *vs.* Wilder, 13 Wall. 254. The expediency and justice of the act of limitations are now generally recognized and the authority of decisions discordant with its policy have been greatly impaired."

In Wood *vs.* Carpenter, 101 U. S. 139, where the defense of limitation was interposed to a suit to vacate certain conveyances on the ground of fraud, the plea was sustained and the court said:

> "Statutes of Limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

It is obvious, therefore, that restricting the scope of the opinion and the decree of this court, and giving it the most limited effect, it is nevertheless a decree upon the merits of the controversy between these parties.

The Effect of the Decree is Not Limited to the Issue Decided.

The contention of counsel for the defendant, however, is, that this court must limit the effect of the decree to the

"issue" decided, which, as he claims, is the right of Cummings to a cancelation of the assignment of fees. And to sustain this view he cites several decisions of State courts.

On the other hand, we contend, the decision of this court having been upon the merits, as we have shown, is conclusive as to all questions, not only the issues decided but those which might have been decided, not only those raised but those which might have been raised.

In the first place, all the authorities say that if the second suit is between the same parties and upon the *same subject-matter*, every question which might have been decided in the first suit is considered as concluded by that suit.

The distinction is this, that if the second suit is between the same parties upon the *same subject-matter*, the first suit concludes everything which *might* have been litigated. If the second suit between the same parties but upon a *different subject-matter*, the first suit concludes only such matters as were *in issue* in the first suit. As finally settling the entire matter, we beg to quote from the opinion of Mr. Justice Field, in Cromwell *vs.* Sac County, 94 U. S. 351.

> "In considering the operatiom of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action *upon the same claim or demand* and its effect as an estoppel in another action between the same parties upon a *different claim or cause of action.* In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, including parties and those in privity with them, not only as to *every* matter which was offered and received to sustain or defeat the claim or demand *but as to any other admissible matter which might have been offered for that purpose.* . . . The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might

> have been presented, is strictly accurate when applied to the demand or claim in controversy; such demand or claim, having passed into judgment, *can not again be brought into litigation between the parties in proceedings at law, upon any ground whatever.* But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon *a different cause of action*, inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel."

And yet the majority of the Court of Appeals (page 326, Record) say:

> "This expression, might have been decided, can not, consistently with reason, be made to include every matter of fact and law that might have been determined in a case under some contingency that did not arise. It would better mean, in our opinion, *that which ought to have been decided*—that is to say, what must have been decided *as expressly at issue*, and that also which must either have been assumed, admitted expressly or by implication, or proved, in order to warrant the judgment or decree rendered."

And the court cites the foregoing decision of this court in Cromwell *vs.* County of Sac, as supporting that proposition. But we submit that case does not at all support the view of the Court of Appeals; on the contrary, it expressly holds—

> "The language therefore, which is so often used, that a judgment estops not only as to *every* ground of recovery or defense *actually* presented in the action, but also as to *every* ground which *might have been presented*, is *strictly accurate* when applied to the demand or claim in controversy; such demand or claim, having passed into judgment, can not be brought into litigation between the parties in proceedings at law *upon any ground whatever.*"

The court below cited in support of its view Last Chance Mining Company *vs.* Tyler Mining Company, 157 U. S. 683; but that case was different in the fundamental feature heretofore mentioned, that is to say, although the former suit in which the judgment relied upon in bar was rendered, was between the same parties, it was not upon the *same subject-matter* as the second suit, and in that respect essentially differs from the case at bar. That clearly appears from the opinion of the court (page 687) where this court said:

> "The particular matter in controversy in the adverse suit was the triangular piece of ground, *which is not the matter in dispute in this action.* The judgment in that case is, *therefore*, not conclusive in this as to matters which might have been decided, but only to matters which were in fact decided.".

Naturally, in view of the limited effect of the former judgment as an estoppel, it was essential to go behind the judgment itself to ascertain the matters in fact decided.

The Court of Appeals in its decision (page 329) said:

> "The conclusion that a decree in equity is not a conclusive adjudication of the merits of the issue joined in this action at law is fully sustained by a decision of the Supreme Court heretofore cited. Phelps *vs.* Harris, 101 U. S. 370, 376, 382."

The court then proceeds to analyze Phelps *vs.* Harris and finds it parallel to the case before the court. The difference between the two cases, however, is fundamental, as will appear from an examination of Phelps *vs.* Harris. In that

case it appears that Mary B. Phelps had previously exhibited a bill in the chancery court of Washington County to remove a cloud from the supposed title raised by a partition proceeding and the will of one Henry G. Vick. The defendants relied on the validity of the partition and will and contested the plaintiff's suit. A decree was made dismissing the bill and on appeal to the Supreme Court of Mississippi, this decree was affirmed. The plaintiffs then brought an action of ejectment and one of the questions in that case was whether the decree in the chancery suit rendered the controversy *res adjudicata*. It was contended that it did not, and that the only effect of the decree was to decide a bill to remove the cloud from the title would lie, leaving the parties to their legal rights in an action at law. On this question the court below found as a fact that the power to make the partition as well as the validity of the devise were directly raised by the bill in the equity case and litigated between the parties and further—

> "that said supreme court decided that the said chancery court *had no jurisdiction thereof* and that if the said plaintiffs therein have any right to the lands described therein and which are the same for which this action of ejectment is brought, it is a *legal title* which must be enforced in an *action at law*."

The decree of the chancery court of Washington County, in the equity case, which was affirmed by the supreme court of that State was in the following words:

> "The court being of opinion that the complainants are not entitled to the relief prayed for in their bill, or to *any relief* in the premises from this court, it is therefore ordered, adjudged and decreed that the complainants' bill of complaint be, and the same is hereby, dismissed."

This court in its opinion said:

> "It is true that the court, in the former part of its opinion, discussed the question of the validity of

> the partition made by H. G. Vick and his son and held that the partition was good and that the title of Henry G. Vick was perfect, and as a consequence, that the defendant's title was also perfect, but this discussion was entered into for the purpose of showing that the title of the defendant was not so devoid of validity as to constitute a mere cloud on the title and consequently that the case was not one in which a court of equity *could* give relief. We think, therefore, that the court below was right in determining that the decree in the equity court did not render the main controversy *res judicata*, but only decided that the bill would not lie; in other words, that it was *not a proper case for the court of equity* to determine the rights of the parties."

It is obvious that the decision in that case does not in any sense support the contention made in this case. As indicated, the difference between the two cases is fundamental. In the case relied upon, the equity suit was dismissed for want of jurisdiction; in this case the equity court had unquestioned jurisdiction, and did in fact litigate the controversy, and it is immaterial which of the defenses interposed was sustained as a basis for dismissing the bill. Had the bill in equity filed by Cummings been dismissed because a court of equity was without jurisdiction, it is conceded the contention now made on behalf of the petitioner would be unsound, but it can not be contended that the court of equity did not have jurisdiction over the matter of accounting, which was the primary object and purpose of the equity suit.

Again, in Davis *vs.* Brown, 94 U. S. 423 this court said:

> "In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action, in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a *different demand*. So far as the demand involved in the action is concerned, the judgment has closed *all controversy*; its

> validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it,
>
> . . . . . .
>
> "When a judgment is offered in evidence in a subsequent action between the same parties *upon a different demand*, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matters, when not disclosed by the pleadings, must be shown by extrinsic evidence."

In Franklin County *vs.* German Savings Bank, 142 U.S. 93, 100–101, the court said:

> "We know of no case which goes to the extent of holding that where a court having complete jurisdiction of the case has pronounced a decree upon a certain issue, such issue may be retried in a collateral action, even although the evidence upon which the case is heard is sent up with the record. If this were possible, then in every such case where a judgment or decree is pleaded by way of estoppel, and the record shows the evidence upon which it was rendered, the court in which the estoppel was pleaded would have the power to retry the case, and determine whether a different judgment ought not to have been rendered."

United States *vs.* Bliss, 172 U. S. 326.

United States *vs.* New York Indians, 173 U. S. 472, 473.

In Werlein *vs.* City of New Orleans, 177 U. S. 390, the city of New Orleans sought to recover from Philipp Werlein a lot of land situated in that city. It appeared that one Klein recovered a judgment against the city of New Orleans and levied upon the premises in question, and advertised the same for sale, and that thereupon the city of New Or-

leans instituted a suit to restrain the sale. This last-mentioned suit came on for hearing on bill and answer, and the court entered a general decree dismissing the bill. Thereafter the property was sold pursuant to the seizure and the title became vested in Werlein. To an action of the city of New Orleans to recover possession of the lot, it was insisted that the city was concluded by the general decree of dismissal in the equity suit. The city sought to overcome this plea by showing that since the sale it had discovered that it held the property seized upon for public use only, and therefore held it in a capacity different from that in which it was sued in the injunction suit. Mr. Justice Peckham, in delivering the opinion of the court, cited with approval the several cases to which we have referred, and said:

> "The fact now alleged would have furnished in a chancery suit but another ground or reason upon which to base the claim of the city that Klein had no right to sell the property under his writ. In other words, it would have been additional proof of the cause of action set forth in that suit. The city had the right to set that fact up in its bill and to have proved it on the trial, and if proved, it would have been foundation for a judgment enjoining the sale of the property, but the fact would have been nothing more than evidence of the right of the city to obtain the injunction asked for in the chancery suit, and that it was the duty of the city to set up in that suit and to prove any and all grounds that it had to support the allegation that Klein had no right to seize or sell the property. . . . It would seem to be quite clear that the plaintiff could not be permitted to prove each independent fact in a separate suit. . . . Thus, as many different actions as the city might allege grounds for claiming the sale would be illegal, could be maintained seriatim, and no one judgment would conclude the city except as to the particular ground upon which the city proceeded in each particular case. . . . It is true that in the chancery suit the thing demanded was an injunction restraining Klein from selling the property,

> while in this suit it is a decree declaring the sale effected by Klein absolutely null and void. But the two demands, though different in terms, are in substance the same, and are *founded upon the same cause of action*, namely, the total illegality of the sale, whether threatened or accomplished."

The present case is very much stronger, because the demand of Cummings in the present case is not only in substance the same as was demanded in the equity suit, but it is the same in terms, and is founded upon the same cause of action, namely, the alleged indebtedness of Baker to him by reason of their partnership dealing.

To the same effect is New Orleans *vs.* Citizens Bank, 167 U. S. page 396.

> "No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which they were based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are estopped from disputing its correctness."
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> Cooley Const. Lim. 47 *et seq.*
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> Heroman *vs.* La. Institute of Deaf and Dumb, 34 La. Ann. 814.

The same thing was decided by Mr. Justice Harlan, on behalf of the court, in Dowell *vs.* Applegate, 152 U. S. 327.

It follows, therefore, assuming that the questions of fraud and no consideration were not in issue in the case, and were not decided, and restricting the opinion and decree to a decision upon the matter of limitations merely, a decision on the question of limitations being now considered a decision on the merits, the decree of this court concludes the defendant upon the issues of "fraud" and "no consideration" even if he had not presented them because they might have been presented in the case.

The Decree Conclusively Presumed to be on the Merits.

It will be noted that the decree of this court and that of the Supreme Court of the District of Columbia made pursuant thereto, was a general decree of dismissal without words of qualification. We submit that the decree, therefore, is *conclusively presumed* to be upon the merits.

In Durant *vs.* Essex Co., 7 Wall. 107, Mr. Justice Field said:

> "The decree dismissing the bill in the former suit in the Circuit Court of the United States *being absolute in its terms*, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on its merits. Walden *vs.* Bodley, 14 Pet. 156; Hughes *vs.* United States, 4 Wall. 237; Bigelow *vs.* Winsor, 1 Gray, 301; Foote *vs.* Gibbs, 1 Gray, 412.
>
> "Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal. Lindsay *vs.* Lynch, 2 Sch. & Lef. 10; Woollam *vs.* Hearn, 7 Ves. 222; Stevens *vs.* Guppy, 3 Russ. 185; Sewall *vs.* Eastern RR. Co., 9 Cush. 13; Miles *vs.* Caldwell, 2 Wall. 45; Carneal *vs.* Banks, 10 Wheat. 192; Dandridge *vs.* Washington, 2 Pet. 378; Peirsoll *vs.* Elliott, 6 Pet. 100; Gaylord *vs.* Kelshaw, 1 Wall. 83; Barney *vs.* Baltimore, 6 Wall. 289; Hobson *vs.* McArthur, 16 Pet. 195."

In Case *vs.* Beauregard, 11 Otto, 688, the court said:

> "Thus it appears, the bill exhibited all that was necessary to give to the court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties, and over all the equities now asserted by the complainant in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. And this must be so, whether the reasons for the dismissal were sound or not. That decree was affirmed in this court and affirmed on the merits. We regarded the case and treated it as requiring an adjudication upon the complainant's equity to be paid out of the property in the hands of the railroad company. Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion that the case was erroneously decided, it would still be *res judicata*, a bar to the complainant, a protection to the defendants."

In Lyon *vs.* The Perrin & Gaff Mfg. Co., 125 U. S. 698, the court said:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, viz: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made. 2 Bouv. L. D. 467. All of these elements or conditions exist in this case, as shown by the master's report, which was to the effect that the averments of said plea were sustained by the evidence; that there was no controversy as to the identity of the cause of the action, or of the identity of the parties in the two suits; that the bill was sworn to by the complainant, and the answer was sworn to by the defendant, and the cause submitted in due course; and that the decree rendered in the suit pending in the court of Ohio was, as it professed to be, an absolute adjudication of the rights of the parties upon the merits, *without any qualifying clause*

and was conducive of the rights attempted to be litigated in this case.

. . . . . .

"This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy, and, therefore, constitutes a bar to any further litigation of the same subject between the same parties. As was said by this court in Durant *vs.* Essex Company, 74 U. S. 107, 109: 'A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, *it is presumed to be rendered on its merits.*'

"To the same effect see Bigelow *vs.* Winsor, 1 Gray, 299, 301, where it is said: 'Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed, in the nature of a discontinuance or nonsuit in an action at law, may be allowed to do so; but we believe the uniform practice in such case is to enter "dismissed without prejudice." '

"Likewise Cooper, Eq. Pl. 270, as follows: 'A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal be not, in direct terms "without prejudice." ' See, also, Story's Eq. Pl. 793, and authorities there cited.

"The authorities to sustain this view of the case might be multiplied, but those cited are sufficient and demonstrate the uniformity of the rule."

In Am. & Eng. Encyc. Law, Vol. 21, page 273, note 1, it is stated:

"The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, and will be presumed to be a final and conclusive adjudica-

tion on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings or in the decree of the court. 2 Smith's Lead. Cas. 667; Moss *vs.* Ashbrooks, 12 Ark. 369; Scully *vs.* Chicago, etc. RR. Co., 46 Iowa, 528; Blackinton *vs.* Blackinton, 113 Mass. 231; Lewis *vs.* Lewis, 106 Mass. 309; Durant *vs.* Essex Co., 7 Wall. 107; Knowlton *vs.* Hanbury, 117 Ill. 471; Case *vs.* Beauregard, 101 U. S. 688; Taylor *vs.* Yarborough, 13 Gratt. 183; Strang *vs.* Moog, 72 Ala. 460."

In Tankersley *vs.* Pettis, 71 Ala. 179, the court said:

"The decree of the court of chancery, dismissing a bill absolutely and unconditionally on a hearing upon the pleadings and evidence, is an adjudication of the merits of the controversy, forming a bar to any further litigation of the same matters between same parties or their privies. A decree of that kind, unless made because of insufficient pleading, or for want of jurisdiction, or for some cause not touching the merits, if not intended to be final and conclusive, is accompanied with words of qualification, with some appropriate terms, indicating that it is not intended to preclude further suit, such as that the dismissal is without prejudice. . . . When, however, the decree of the dismissal is unqualified, *it is presumed to be an adjudication on the merits* adversely to the complainant, and constitutes a bar to further 'litigation of the same matters between the parties.' Adams *vs.* Cameron, 40 Mich. 506; Thompson *vs.* Clay, 3 T. B. Mon. (Ky.), 359; Pelton *vs.* Mott, 11 Vt. 148; Stickney *vs.* Goudy, 132 Ill. 213; Kelsey *vs.* Murphy, 26 Penna. St. 78; Foote *vs.* Gibbs, 1 Gray (Mass.), 412; Thurston *vs.* Thurston, 99 Mass. 39; Lyon *vs.* Perrin, etc., Mfg. Co., 125 U. S. 698; Hicks *vs.* Aylesworth, 13 R. I. 562; Grove *vs.* Lyford, 44 N. H. 525; Foster *vs.* The Richard Busteed, 100 Mass. 412."

In Foote *vs.* Gibbs, 1 Gray, 413, in which the complainant's bill was dismissed on motion, dismissal not being in

express terms "without prejudice," Chief Justice Shaw held:

> "The only question in this case is upon the effect of the former decree. It is a fundamental rule in the administration of justice that a question once litigated and determined between the parties, in a court of competent jurisdiction, is to be considered as at rest. But if a court does not take jurisdiction of a suit in equity, but dismisses the bill, because the plaintiff has an adequate remedy at law, or for want of prosecution, or otherwise, for some cause not embracing an adjudication on the merits, such dismissal is not a bar. There is nothing to indicate the grounds of dismissal in this case, except the fact of dismissal, after an appearance for the defendant. But the authorities, both in England and in this country, are decisive that a general entry of bill dismissed with no words of qualification, such as 'dismissed without prejudice,' or 'without prejudice to an action at law,' or the like, is *conclusively presumed* to be upon the merits, and is a final determination of the controversy."

In Bigelow *vs.* Winsor, 1 Gray, 301, the court held:

> "Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed in the nature of a discontinuance or non-suit in an action at law, may be allowed to do so; but we believe the uniform practice in such a case is to enter 'dismissed without prejudice.' So, when a decree against the plaintiff in equity proceeds on the ground that he has adequate remedy at law, the course is to dismiss it without prejudice to an action at law.
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> "A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing and if that dismissal be not, in direct terms 'without prejudice.' Coop. Eq. Pl. 270."
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> "In determining what has been adjudged, the courts will regard the decree, and in case of am-

biguity, *but not otherwise*, will be governed by an accompanying opinion; where it is free from ambiguity, it speaks for itself and can not be qualified by an opinion by which it may have been preceded.

"A general dismissal of a bill may be pleaded in bar to a subsequent bill for relief on the same subject matter. For the reason that a dismissal of a bill in chancery stands nearly on the same footing as a judgment for the defendant in any action at law, the presumption is that it was a final and conclusive adjudication upon the merits, whether they were or were not determined, unless from the decree of the court it appears that they were not determined, or that fact is apparent on the face of the record."

Herman on Estoppel and Res Adjudicata, Vol. 1, p. 471.

"But a decree dismissing a bill in any United States court is absolute, and constitutes a bar to any further litigation between the same parties upon the same subject matter, unless made because of some defect in the pleadings or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon any other grounds which do not go to the merits, is a final determination. But where words of qualification are used, such as 'without prejudice,' or other terms indicative of a right or privilege to take further legal proceedings on the subject, do not accompany a decree, the presumption is that it was dismissed on its merits. This presumption is based upon the fact that where there are no words of qualification, as 'without prejudice,' the dismissal has been adjudged upon proper exceptions or other regular proceedings which brought into review the merits of the bill dismissed."

Herman on Estoppel and Res Adjudicata, 473, 474.

In New Orleans M. Co. *vs.* City of New Orleans, 14 Fed. Rep. 373, where the defense of *res adjudicata* was interposed, based upon a general decree of dismissal, which was

sought to be explained by the opinion of the court, it was held:

> "There is no doubt that if a decree is free from ambiguity, it speaks for itself and can not be qualified by the opinion by which it may have been preceded. 101 U. S. 551; 24 How. 333; 7 How. 199."

If, therefore, the decree in the equity case is conclusively presumed to be upon the merits, the equity case possessed all of the elements necessary to render *adjudicata* the several items of set-off filed in this suit, being the "identical items set up, referred to and claimed in said equity cause."

Defendant's Claim.

Much of the argument of the defendant proceeds on the theory that as some of the fees claimed in the set-off or counterclaim were received by Baker within three years of the time of filing such set-off or counterclaim, therefore, the assignment having been without consideration, he is entitled to recover the aggregate amount of such items. But this argument overlooks the fact that *so long as the assignment stands as a valid and subsisting instrument, the money which Cummings claims to belong to him, in fact, belongs to Baker.* Cummings can not go back of the assignment or set it aside because his right to do so, *for any reason whatever*, is finally concluded by the decree of this court. To adopt any other view would be to hold that the equity suit was a farce; that it concluded no one; that it decided nothing and that Cummings had the right to use the court to litigate his claims and when determined adversely to him, to repudiate the decree. Can Cummings in this law suit then say the assignment was without consideration and void, or that it was obtained by fraud? In the suit filed by Cummings, this court certainly decided that Cummings could not set the assignment aside *for any reason whatever.* It will be noted that the set-off or counterclaim was filed *more than two years after the*

equity suit. In its opinion the court stated that Cummings *might at his election have pursued a remedy for the alleged fraud in a court of law*, and that it is clear that such an action predicated upon the facts set up in the bill in the equity case would have been barred in three years from the discovery of the fraud. The court further said: "It hence follows *irrespective* of the doctrine of *laches* that the relief which the bill seeks to obtain ought not to be allowed by a court of equity." It is apparent, therefore, that the court expressly decided that Cummings was barred at law from setting aside the assignment, even though his suit for that purpose had been instituted at the same time the equity suit was instituted. But, as we have shown, his set-off or cross-action was in fact instituted more than two years *after* the equity suit. On what theory, then, can the defendant claim the right to set up any of these items of set-off in the law suit, the same being "the identical items set up, referred to and claimed in said equity cause?" As Judge Cole says in his opinion:

> "Another view of that adjudication is equally conclusive against the defendant. The Supreme Court held the equity suit to be barred on the ground that a suit at law brought at the time the equity suit was filed would have been barred. The earliest pleading of the defendant in this suit, which could by any possibility be construed to assail the sale or assignment for fraud and want of consideration was filed two years later than the bill in equity. The record, therefore, is an express adjudication that he is barred from questioning the validity of the sale and assignement at law in this suit as well as in the equity case."

In Godden *vs.* Kimmell, 98 U. S. 201, an appeal from the Supreme Court of the District of Columbia, this court clearly pointed out the difference in effect between *laches* when interposed as a defense in an equity suit based upon a matter within its concurrent jurisdiction and *laches* interposed

as a defense to a suit, the subject-matter of which is exclusively equitable. Mr. Justice Clifford in delivering the opinion of the court said:

> "Statutes of limitation form part of the legislation of every government and are everywhere regarded as conducive and even necessary to the peace and repose of society. When they are addressed to courts of equity as well as to courts of law, as they seem to be in controversies of concurrent jurisdiction, they are *equally obligatory* in both forums as a means of promoting uniformity of decisions."

Again, in the same case, this court said:

> "Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which governs courts of law in like cases, and this is rather in *obedience* to the statute of limitations than in analogy. Wagner *vs.* Baird, 7 How. 234."

Moreover, the same contentions, now made in this case, were made by the defendant in this court in the equity case, and this court not only considered them, but distinctly decided them. This court, in its opinion, after considering the principles which control the decision of the case, said:

> "These broad considerations of equity and justice were not applied below because it was deemed that the occasion for their enforcement had not arisen, for two reasons: First because it was thought that even if Cummings discovered the fraud in ample time to have availed himself of his rights, he was lulled into not doing so by his faith and confidence in Baker and his disinclination to believe that Baker had perpetrated so gross a fraud upon him. Second, because it was said as Cummings' share of the earned fees, upon the theory of a half and half division, was equal to the price which he received, *there was no consideration for the sale*, and the transaction was *wholly void*, hence there was no room for the application either of the Statute of Limitations or the doc-

trine of *laches*. In other words, that the partnership continued as to the inspector claims just as if no sale had been made. And the doctrine was carried to its logical outcome, since the judgment below awarded to Cummings a share in the fees earned by Baker, from contracts not under the control of the firm at the time of the sale of the interest in the inspector cases, but which were acquired by Baker thereafter.

"But *neither of these views meets our approbation.* The first is *completely answered* by the fact that the analysis of the evidence which we have made conclusively establishes that if the fraud was perpetrated as alleged, the fullest knowledge was conveyed to Cummings more than three years before he brought his suit. . . .

"The *second proposition*, conceding *arguendo* the facts are as it assumed them to be—that is, that the price was paid *Cummings from his own money*—leads in reason to an equally *impossible result*, since its consequence is substantially to affirm that neither limitation or *laches* can be applied in equity when, from a given view of the proof, it is considered that a fraud has been committed of such a nature as to avoid a contract. That this is the logical outcome of the proposition is shown by its application to the case under consideration. . . .

"To say, then, that Cummings was paid by his own money necessitates deciding that the fraud was established as alleged by Cummings. . . .

"Because we rest our conclusions upon the application of the bar of the statute and the *laches* of Cummings, *we must not be considered as intimating that we conclude that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings.*"

We submit these extracts from the opinion of the court constitute a complete answer to the contentions of the defendant in this case.

Defendant's counsel, in his brief in the court below, said

in the equity suit the defendant is entitled to recover "more" than at law. And again (p. 16, Brief):

> "It is true we asked that court on the ground that as it had (as we believed) jurisdiction of a part of the matter, to settle the *entire* controversy in its court."

It seems to us that statement ought to end this controversy. The defendant not only asked the court to take jurisdiction and grant him a decree against the appellee for each and every item embraced in the set-off, but also that the assignment should be canceled, and actually obtained a decree to that effect. The stipulation admits he claimed these items in the equity suit. It admits he offered evidence in reference to the same. It admits he had an accounting in reference to the identical items, and that at one stage in the case he had a decree against the petitioner for them. He failed in the equity suit to recover the self-same items claimed in the set-off because the assignment was not vacated. How, then, can he in this suit, brought two years later, recover any of these items when he is prevented from questioning the validity of the assignment?

In 1897 the Court of Appeals of Maryland decided an interesting case where a similar effort was made to avoid the effect in a law suit of a decree in an equity suit theretofore pending between the same parties.

It is the case of Martin *vs.* Evans, 85 Md. 8, decided in 1897. That was a suit brought by Martin against Evans in trover to recover the value of certain bonds alleged to have been converted. To the declaration three pleas were filed, the second being *res adjudicata*. That plea set forth the proceedings in an equity case at one time pending between the same parties and averred that the relief sought in that case was the recovery of the value of the identical bonds for the alleged conversion of which this action was subsequently instituted. With the plea there was filed a copy of the bill in equity and of the court's opinion and the

final order dismissing the bill. To this plea the plaintiff demurred. The demurrer was sustained and an appeal was prosecuted to the Court of Appeals. McSherry, C. J., in delivering the opinion, said:

> "Now, it is not denied and it could not well be disputed at this day that if a question has once been tried and determined, without fraud or collusion, but on its merits by a court having jurisdiction of the parties to the controversy and of the subject matter involved therein, it can not again be litigated between the same parties, in the same or any other tribunal, so long as the adjudication remains unreversed and in full and operative effect.
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> "Recognizing this, the appellant seeks to avoid its application by insisting that the bill in equity was dismissed for the want of jurisdiction, and that the relief sought under it was denied, not because it was determined the plaintiff had no title to the bonds, but because it was decided there was an adequate remedy at law, and, therefore, the equity court was without jurisdiction to pass any decree adjudicating the title to the bonds at all.
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> "In the opinion the learned judge went fully into a discussion of the evidence adduced before him on the issue of the ownership of the bonds, which, it appears, were claimed to have been an *inter vivos* gift made by Reed to the plaintiff; and after a careful and critical analysis and review of all the evidence, he explicitly decided that the bonds were not the property of the plaintiff, but that they belonged to Reed. Having reached that conclusion on the merits, the judge incidentally, it would seem, observed later on in the same opinion: 'I have thus, at the request of the solicitors in the case, gone into the merits and would dismiss the bill without regard to technical objections. But it seems to be perfectly clear that this proceeding could not be sustained at any rate, as at best it would be simply a conversion

of the plaintiff's property by Reed, for which she had an ample remedy at law. If the bonds were hers, she could have recovered in the suit she had on the law side of this court, or she could have instituted an action of trover.'

"These few sentences are now seized by the plaintiff and are relied on by her to show that the equity court dismissed the bill for the want of jurisdiction to entertain it; and the inquiry comes to this: Do these extracts from the opinion demonstrate, or can they be resorted to for the purpose of showing, that the bill in equity was dismissed—not because there was no decision on the merits, but because the court was without authority to pass upon the merits at all? The merits certainly were considered, discussed and decided. The opinion, if it can be consulted to measure the scope of the final order, leaves no room to doubt this. If the merits had in reality nothing to do with the ultimate conclusion reached in the equity case, it is difficult to understand why they were considered or decided at all. And if, in fact, the bill was dismissed solely for the want of jurisdiction in the court to grant the relief asked, and not because the evidence did not justify the granting of the relief, there would have been no occasion to advert to the merits.

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"The decretal order itself does not show upon what ground the bill was dismissed.

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"Even if the opinion may be looked to for the purpose of ascertaining whether the equity court considered that there was an adequate remedy at law, still there are no qualifying words in the decretal order warranting the inference that the merits were not finally adjudicated, or indicating that the dismissal was founded on purely technical grounds. Whenever a decree dismissing a bill in equity fails to restrict its own scope, the presumption, according to the great preponderance of decided cases, is, that the issues raised by the proceedings have been dis-

posed of on their merits and they therefore become *res judicata*. When the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties. Tankersley *vs.* Pettis, 71 Ala. 179; Story's Eq. Pl., 793; Adams *vs.* Cameron, 40 Mich. 506; Thompson *vs.* Clay, 3 T. B. Monr. 359; Pelton *vs.* Mott, 11 Vt. 148; Stickney *vs.* Goudy, 132 Ill. 213; Kelsey *vs.* Murphy, 26 Pa. St. 78; Foote *vs.* Gibbs, 1 Gray, 412; Thurston *vs.* Thurston, 99 Mass. 39; 6 Encyc. Pl. & Pr. 993, and the large number of cases there collected.

"In Foote *vs.* Gibbs, *supra*, it was said: 'There is nothing to indicate the grounds of dismissal in this case, except the fact of dismissal after an appearance for the defendants. But the authorities, both in England and in this country, are decisive that a general entry of "bill dismissed" with no words of qualification such as "dismissed without prejudice," or "without prejudice to an action at law," or the like, is conclusively presumed to be upon the merits and is a final determination of the controversy.' And so in Durant *vs.* The Essex Co., 7 Wall. 107, the Supreme Court, in speaking of a decree dismissing a former bill between the same parties, said: 'The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice" or other terms indicating a right or privilege to take further legal proceedings on the subject do not accompany the decree, it is presumed to be rendered on the merits.' And Walden *vs.* Bodley, 14 Pet. 156; Hughes *vs.* United States, 4 Wall. 237; Bige-

low *vs.* Winsor, 1 Gray, 301, and Foote *vs.* Gibbs, 1 Gray, 412, were cited. The case of Durant *vs.* The Essex Co., *supra*, was followed and relied on in Lyon *vs.* Perrin, etc., Mfg. Co., 125 U. S. 698.

"The broad terms of the decretal order dismissing the bill can not be limited, qualified or restricted by the opinion filed in the equity case. The opinion of the judge is the expression of the reasons by which he reaches his conclusions; these may be consistent or contradictory, clear or confused.

"The judgment or decree is the fiat or sentence of the law, determining the matter in controversy in concise, technical terms, which must be interpreted in their own proper sense. It would, we think, be a dangerous tendency to make the force and effect of the most solemn official acts depend upon the various interpretations which ingenuity might suggest to the most carefully considered language introducing them. State, use of Bruner et al., *vs.* Ramsburg et al., 43 Md. 333. Or, as succinctly expressed in Durant *vs.* The Essex Co., *supra*, the reason for the signing of a decree 'is no part of the judgment itself.' The decree, and not the opinion, is the instrumtnt through which the court acts. Wood, etc., *vs.* Fuller, 61 Md. 460.

"Agreeing, as we do, with the circuit court that the conversy involved in this case was fully and finally determined by the decree in the equity case between the same parties, we affirm its judgment with costs."

In view of the foregoing, we respectfully submit, in the language of the stipulation—

> "that the defendant [respondent] herein may not set up in bar of the plaintiff's action any of said items of set-off and counterclaim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause,"—

and that, therefore, the judgment of the Court of Appeals was wrong and should be reversed, and the judgment of the Supreme Court of the District of Columbia affirmed.

Any other conclusion would indeed convert into a farce the eight years of expensive litigation between these parties. Necessarily, to say that the effect of the former unqualified decree of this court operates merely as a bar to an actual cancelation of the assignment, and that Cummings may in this suit offer precisely the same evidence again to accomplish precisely the same result, is likewise to say that Cummings may vex Baker with as many suits as he may allege grounds for vacating the assignment.

CLARENCE A. BRANDENBURG,
Counsel for Petitioner.

APPENDIX.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } No. 30197. Law.

WASHINGTON, D. C., November 18, 1898.

Mr. Justice COLE said:

In the case of Baker *vs.* Cummings, an action at law, the declaration seems to have been filed on the 19th day of December, 1889. The defendant Cummings, without pleading to the action at law, filed a bill in equity in the early part of February, 1890, for an injunction to restrain the prosecution of this action and to have the account settled between him and Baker, who is the plaintiff in the action at law. The grounds of equitable jurisdiction alleged were that they had been jointly interested in the prosecution of certain claims against the Government of the United States, and that fees had accumulated in which they were jointly interested and that on a certain day the plaintiff in the equity suit, Cummings, had agreed to and did assign to Baker all his interest in these fees for the sum of $15,000; and the allegation of the bill was that he, Cummings, was induced to enter into that contract by false representations made to him by Cummings, and that the sum paid, $15,000, was not more than, if even as much as he was entitled to out of the fees anyway, so that the sale was without consideration and that the amount of the fees to which he was entitled was largely in excess of $15,000, even as much as $40,000; and he prayed that the sale and assignment should be declared void, as obtained by fraudulent representations, and that the account should be settled, and Baker decreed to pay what should be found to be due on such settlement. The case

proceeded through this court and Cummings obtained a decree. The court found that the sale and assignment were fraudulent and void and set them aside, and settled the account and found a large balance in favor of Cummings. After giving him credit for the amount Baker sued for in the action at law, there was a large balance left due Cummings from Baker which was decreed to be paid him by this court; and that decree was affirmed by the Court of Appeals, but the Supreme Court of the United States reversed both decrees and directed the dismissal of the bill, which was done in this court in April or May last. The decree was a formal decree dismissing the bill by direction of the mandate of the Court of Appeals.

Now, after the filing of that bill in equity by Cummings against Baker, on February 10, 1892, two years after he had brought his bill in equity, Cummings pleaded his share of these fees he claimed as a set-off in the law suit. Of course Baker could take no action upon that plea at that time for he was enjoined from doing anything in the law cause by an injunction of the court. The matter was in controversy in the equity case and he was enjoined from proceeding in the law case and it stood that way until after the bill was dismissed in this court pursuant to the mandate of the Court of Appeals.

After the entry of the decree in this court, the plaintiff in the law case, Baker, pleaded by way of replication to the defendant's pleas of set-offs, in bar of said pleas, the adjudication in the equity suit. From this point the pleadings have been rather circuitous, culminating in a demurrer of the plaintiff to the rebutters of the defendant. There were two rebutters. They alleged that the decision of the equity case turned upon the point of the Statute of Limitations or *laches*, and that the allegation of fraud and want of consideration alleged in the pleadings in this case as grounds for avoiding the sale and assignment, were not adjudicated in

that case, and he refers to the opinion of the Supreme Court of the United States in support of the allegation.

The ground of the plaintiff's demurrer is that the Record is as much of a bar as if those questions had been expressly adjudicated. The rule upon this point is that where a case has been adjudicated upon its merits, it is a bar to further litigation between the same parties on all questions raised by the pleadings, whether they were actually decided or not. The questions of whether the sale and assignment were procured by fraud and were without consideration, were raised by the pleadings in the equity cause. The defendant's counsel admits that the question of fraud, but he denies that the question of "no consideration," was raised by the pleadings in the equity case. The Supreme Court in its opinion, however, considered that the question of "no consideration" was before that court. Counsel for the defendant replies that that part of the opinion is *obiter*. But this court must assume that the construction by the Supreme Court of the pleadings in that cause, by which it ascertained and declared that the question of "no consideration" was at issue, is correct. So that the defendant is concluded by the record referred to upon both those points if the decree dismissing the bill is a decree upon the merits.

A decree dismissing the bill is *prima facie* construed to be a decree upon the merits unless there is something in the decree itself to indicate to the contrary, and nothing of the sort is found in the decree in this case. Probably, the opinion of the court, where there is one, may be examined for the purpose or ascertaining whether the decree was on the merits where it is not expressly shown on the face of the decree itself, as is true in this case. Looking then to the opinion of the court, it appears that the decree was based upon the finding by the court that the defendant had a remedy at law for the matters stated in the bill and that the Statute of Limitations would have barred an action at law

and therefore that the period of the statute should by analogy be considered *laches* in equity. The Statute of Limitations was expressly pleaded by Baker in the equity cause and that plea has always been held by the Supreme Court to be a plea to the merits and therefore a decree sustaining that plea is a decree on the merits.

Another view of that adjudication is equally conclusive against the defendant. The Supreme Court held the equity suit to be barred on the ground that a suit at law brought at the time the equity suit was filed would have been barred. The earliest pleading of the defendant in this suit, which could by any possibility be construed to assail the sale or assignment for fraud and want of consideration, was filed two years later than the bill in equity. The Record therefore is an express adjudication that he is barred from questioning the validity of the sale and assignment at law in this suit as well as in the equity case, and it follows that the demurrer to the rebutter must be sustained.

The foregoing is a correct stenographic report of the verbal statements of the court in sustaining the plaintiff's demurrer to the defendant's rebutters.

CHAS. C. COLE.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

HENRY M. BAKER
vs.
HORACE S. CUMMINGS. } No. 30197, Law.

The opinion of Chief Justice BINGHAM *delivered on Monday, March 27, 1899:*

This case was submitted to the court to determine what the judgment of the court should be under certain contingencies. The stipulation filed in the case is as follows:

"It is hereby stipulated and agreed by and between the

parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained:

"That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were co-partners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, 1889, the plaintiff instituted this action to recover the sum of $2,712.81, with interest from the 31st day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the Record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to; that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the Supreme Court of the District of Columbia, the same being known and numbered on the dockets of said court as equity cause No. 12,263; the record, decrees, and opinions of the respective courts therein, both in this and the appellate courts are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set-off herein are respectively the identical items set up, referred to, and claimed in said equity cause.

"If the court on inspection of said record and proceedings in said equity cause and of the record and proceeding of this cause shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action and of said items of set-off and counterclaim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of $2,712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration, herein, but if the court shall be of opinion that

any of said items of set-off and counterclaim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon and also any other remedy which they may by law be entitled to."

From this stipulation, it is manifest, the decision of this case involves substantially the question whether the decree of the Supreme Court reversing the decrees of the Court of Appeals of this District and the Supreme Court of the District is a substantial adjudication of the matters set forth in the pleas of set-off filed by the defendant in this case. It is agreed that the items in the pleas of set-off in this case are precisely the same as the matters of account set forth in the bill in equity and that the court had all of these matters before it at the time of these respective adjudications. Testimony was taken, the case was referred to the auditor, testimony was taken before him by each of the parties *in extenso* and a report was made by the auditor which was confirmed by the Supreme Court of the District of Columbia, which rendered a decree in favor of the complainant in the equity suit. From that decree an appeal was prosecuted to the Court of Appeals and there was an affirmance by that court of the decree of the Supreme Court of the District of Columbia. An appeal was taken to the Supreme Court of the United States which resulted in the reversal of the decision of the courts below and of the entry of a decree dismissing the bill generally, without any words of limitation. It is shown by the Record that the matters that are now involved in the plea of set-off were involved in that case, that they were discussed and commented upon by the court in its opinion and necessarily decided by the court. It is a general rule of law that not only are all things which are directly pertinent to the litigation, and which are expressly litigated, adjudicated, but also all things which might have been litigated under the issues—that they are

to be construed as disposed of by the decree. In this case it seems to me not only might the matters of account between the parties have been litigated but that they were litigated and that all the matters of set-off on the part of the defendant in this case were expressly in issue and expressly litigated in the equity case. The decree of the Supreme Court reversing the court below, which had been in favor of Cummings, puts an end to the litigation.

This same matter has been once directly involved by a demurrer which was filed to the pleas. That demurrer was heard by Mr. Justice Cole and a decision rendered by him sustaining the demurrer. In sustaining that demurrer, as appears by the record, he decided the very question that is now before me in a different form. It is a rule from which we never depart, except for some very ample reason, that where a matter in a case has been once determined, whether of law or fact, by one justice of this court, that another justice of this court will not attempt to consider or reverse the former decision while that decision remains unreversed. From a reading of the opinion of Justice Cole, it is manifest he considered the same question. That alone would prevent me from finding for the defendant upon this stipulation; but beyond that, I have examined the Record sufficient to satisy myself that the decision of Justice Cole is entirely correct and one that I would have made if I had been in his place. There is no opportunity for criticising or reversing that decision.

The stipulation here is that if a court on inspection of the record and proceedings in the equity case and of the record and proceedings in this case, shall be of opinion that the defendant may not set up in bar of the plaintiff's action any of the items of set-off and counterclaim as pleaded in this action, judgment may be rendered for the plaintiff with interest. As I am of the opinion that the defendant may not set up in bar of the plaintiff's action any of the items of set-off, judgment will be rendered for the plaintiff for the amount claimed.